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IN THE

Supreme Court of the United States

No. 553 October Term, 1944.

M. E. BLATT COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TABLE OF CONTENTS OF PETITION.

TABLE OF CONTENTS OF PETITION—Continued.

TABLE OF CASES CITED IN PETITION.

TABLE OF CASES CITED IN PETITION—Continued.

STATUTES CITED IN PETITION.

APPENDIX.

TABLE OF CONTENTS TO BRIEF.

TABLE OF CONTENTS TO BRIEF—Continued.

TABLE OF CASES CITED IN BRIEF.

TABLE OF CASES CITED IN BRIEF—Continued.

TABLE OF CASES CITED IN BRIEF—Continued.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, M. E. Blatt Company, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The first question involved in this proceeding is whether the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. 151, referred to herein as "the Act") applies to a local retail department store.

The second question is whether an employer is prohibited under the Act from posting a notice (side by side with the notice required by the National Labor Relations Board) advising the employees that they may join any

Union they wish to join and that membership will not affect their positions and further that it is not necessary for them to join, since no law requires them to do so; and calling attention to twenty-five years happy relationship of confidence and understanding.

The third question involved is whether an employer, in addition to being required to withhold recognition, may be ordered to "disestablish" an unaffiliated Association where it has not been found that he controls it but that only he was unneutral as between it and another Union.

On July 31, 1941 the National Labor Relations Board filed its complaint against the Employer Petitioner (R. 87) charging it with certain alleged unfair labor practices and alleging that the Employer was engaged in interstate commerce within the meaning of the Act. An answer was filed denying all charges and jurisdiction (R. 91).

On June 11, 1942 the Board filed a Complaint (R. 279) against the Employer again charging that it was engaged in interstate commerce and that it had committed unfair labor practices in posting notices and in dominating and interfering with the formation of an unaffiliated Association. The Answer of the Employer (R. 286) again denied that it is engaged in interstate commerce within the meaning of the Act and denied the charges.

In its findings of fact, the National Labor Relations Board (herein called "the Board") (R. 97) describes the Respondent as having its principal office and place of business in Atlantic City, New Jersey, where it conducts a retail department store business for the "purchase, sale, and distribution of general merchandise, including household furnishings and equipment, wearing apparel, notions, cosmetics, and other commodities. During 1941, the Respondent's wholesale purchases of merchandise for the operation of its business totalled $1,530,842. Approximately ninety-five per cent of such merchandise was acquired by and shipped to the Respondent from points outside the State of New Jersey. In this period, the Respondent's

gross sales amounted to $2,332,292. Included in these sales was merchandise in the amount of $16,326, which was shipped by the Respondent to points outside the State of New Jersey." The percentage of total sales so shipped out of New Jersey is about 0.7 of 1 per cent. For the year 1940 the Board had also found figures of such out of State deliveries amounting to 0.7 of 1 per cent. of the total sales (R. 4)

Long after the decision and order of the Board which was filed February 14, 1942 (R. 2) and considerably after the decision and order filed February 26, 1943 (R. 95), namely, on October 7, 1943, the Board filed its Petitions in the Circuit Court of Appeals for the Third Circuit for enforcement of those Orders (copies included in the certified record and proceedings were numbered 8493 and 8494). The Employer Petitioner filed Answers denying that it was engaged in commerce within the meaning of the Act and otherwise denying the charges.

The Court, in an opinion filed June 9, 1944 by Circuit Court Judge Biggs, held that the Employer was subject to the Act; that thereunder the Employer was prohibited from posting the notices referred to above and that the Employer was to "disestablish" the Association.

The Court states in its opinion:

> "The respondent contends that it is not subject to the Act because whatever goods are shipped to it for retail sale come to 'complete rest' and cease being in the stream of interstate commerce upon delivery to it. We dealt with a substantially similar contention in *National Labor Relations Board v. Poultrymen's Service Corporation*, 138 F. (2d) 204 and found it to be without merit. We adhere now to this ruling."

On July 5, 1944 a final decree was entered by the Court in accordance with the opinion.

B. STATEMENT DISCLOSING BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE DECREE OF THE CIRCUIT COURT OF APPEALS.

(a) This Honorable Court has jurisdiction to review the decree of the Circuit Court of Appeals in this case under the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. 347 (a); under Section 10 (e) of the National Labor Relations Act as amended (Act of July 5, 1935, C. 372; 49 Stat. 453; 29 U. S. C. A. 160); and under Rule 38, Sect. 5, subsection (b) of this Court.

(b) The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935, C. 372; 49 Stat. 449; amended June 25, 1936, C. 804; 49 Stat. 1921; 29 U. S. C. A. 151, etc.) the pertinent excerpts from which are set forth in the appendix annexed hereto.

(c) The Decree of the Circuit Court of Appeals for the Third Circuit, now sought to be reviewed, was entered on July 5, 1944 and was final in form and effect. Petitioner has filed a motion to stay the enforcement of the Decree upon which an Order was entered staying the same for the period in which a Petition for Certiorari could be filed.

C. QUESTIONS PRESENTED.

The principal questions presented are:

(a) Where an Act defines "commerce" as meaning trade, traffic, transportation or communication among the several States, and defines "affecting commerce" as in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, and authorizes the Board to prevent any person from engaging in any unfair labor practice "affecting commerce", was it intended to include within

the terms "commerce" or "affecting commerce", the operation of a local retail establishment known as a department store which, over the counter, sells goods which have come to rest on its shelves?

The Circuit Court held that such an operation is covered by the Act.

(b) Is it an unfair labor practice within that Act (where the Board has ordered the employer to post a notice, notifying the employees that they are free to join a labor organization and that the Company will not discourage membership in a particular named Union or any other labor organization) for the employer to also, side by side, merely post a notice again stating that the right of an employee to join a Union is recognized and membership will not affect his position but that, on the other hand, it is not necessary for the employee to join any labor organization; and that no law requires him to do so; and calling attention to twenty-five years happy relationship of mutual confidence and understanding?

The Circuit Court held that it was an unfair labor practice for the Employer to post such a notice and that its prohibition did not improperly infringe upon the Employer's right of free speech.

(c) Can an Employer, found by the Board not to have disparaged the Union but only to have been unneutral in the membership campaign carried on by the Union and an unaffiliated Association, order the Employer, in addition to withholding recognition, to "disestablish" the Association where it is not found that the Employer controlled it?

The Circuit Court ordered the Employer to disestablish the Association.

D. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits, With Reference to the Interstate Commerce Question.

The Circuit Court, in its conclusion, differed with the opinions of other Circuit Courts as to the applicability of the Act to the business of a local merchant—even where the greater part of the merchandise stock in trade, before it came to rest in the store, originated outside of the State. *Consolidated Edison Co. v. National Labor Relations Board*, CCA (2), 95 F. (2d) 390, 393; affirmed 305 U. S. 197; 59 S. C. 206; 83 L. Ed. 126. *National Labor Relations Board v. White Swan Company*, CCA (4), 118 F. (2d) 1002. *Schroepfer v. A. S. Abell*, CCA (4), 138 F. (2d) 111.

II. The Circuit Court, With Reference to the Interstate Commerce Question, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by the Supreme Court.

This Honorable Court has already passed upon the constitutionality and the applicability of the Act in connection with production or actual transportation or other phases of economic processes prior to the time that goods come to rest, for the purpose of local sales, on the shelves of a local merchant. This case presents the question, which counsel believe has not been definitely and finally passed upon by this Honorable Court, as to whether the ordinary local over the counter sales of a merchant in a local store establishment, having no branches or selling outlets in other States, and not being a mail order house, is controlled by the Act. On principle, the question should be the same whether it applies to a small corner cigar store or a neighboring large department store. The point to be determined is whether or not there is not a legal and economic difference between a business engaging entirely in local intra-

state distribution of goods over its counter and the other economic phases of production and distribution prior to the time that the goods reach the store of the local merchant. Counsel are of the opinion that it has generally been understood that the local retail store selling over the counter is a business whose labor relations are subject to State control and not Federal control and that its operations do not constitute interstate commerce or acts affecting the same either within the terms of the Act or the Constitution.

Obviously this question is a very important one because it affects a very large number of businesses and a large segment of the ecnomic structure.

III. The Circuit Court, With Reference to the Interstate Commerce Question, Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of this Honorable Court.

In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30, 81 L. Ed. 893, 914, 57 S. C. 615, in which the Supreme Court upheld the constitutionality of the Act, the Court clearly and definitely stated that there was no question but that the commerce contemplated by the Act is "interstate and foreign commerce in a constitutional sense."

Also *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 146, 81 L. Ed. 965, 969, 57 S. C. 648.

Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, 460, 82 L. Ed. 954, 957, 58 S. C. 656.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 83 L. Ed. 1015, 59 S. C. 668.

And many other decisions of the Supreme Court on other interpretations of interstate commerce which are supposed to have set the limits which it is respectfully submitted the decision of the Circuit Court has exceeded.

Schechter v. United States, 295 U. S. 495, 55 S. C. 837.

Carter v. Carter Coal Co., 298 U. S. 238, 56 S. C. 855.

Federal Trade Commission v. Bunte Bros., Inc., 312 U. S. 349, 355, 85 L. Ed. 881, 885, 61 S. C. 580.

Walling v. Jacksonville Paper Co., 317 U. S. 564, 570, 87 L. Ed. 460, 467, 63 S. C. 332.

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. C. 40.

IV. Importance of the Questions Involved.

The settlement of the issues raised herein is of great public importance because they apply to a very numerous group of businesses, namely, the thousands of local retail establishments throughout the country and affect controversies which have arisen and will arise time after time under the Act. The interstate commerce question is one which will determine whether or not the Act is to cover practically every business or whether it was intended to cover only those businesses whose operations come within the limits of what has ordinarily been recognized as interstate commerce or as directly and immediately affecting interstate commerce. Under modern conditions it is very difficult to imagine a store, be it large or small, whose goods, in a substantial part, did not originate in some other State. It is felt that the origin of the goods and transportation and distribution before coming to rest upon the shelves of the retail storekeeper, are things apart from the operations of the storekeeper; so that his sales over the counter do not constitute interstate commerce or acts affecting interstate commerce. Until this question is finally and conclusively decided confusion in the minds of the Bar and Courts will continue.

V. The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Decisions of Other Circuits With Reference to the Right of Free Speech of the Employer.

The Petitioner respectfully claims the privilege of its constitutional right of free speech. The Act neither was intended to, nor could it, make it unlawful for it to express its opinion to its employees to the effect that they might join any Union they want to and it would not affect their positions but that, on the other hand, they did not have to join any Union or pay dues; and further that for twenty-five years there had been a happy relationship of mutual confidence. This statement (R. 99) and a subsequent notice (R. 105) (shorter but to the same effect) were not accompanied by any threats by the Employer. Nor were there any unfair labor practices at or about the time the notices were posted, except the alleged preference of the Employer for the Association over the Union. Indeed, the Board itself has found that the Petitioner did not engage in disparaging the Union or in surveillance of Union members or leaders or indiscriminatorily transferring any employees (R. 118 and 114). Assuming what the Petitioner denied and still denies, that it was not neutral as between the Association and the Union, nevertheless, that alleged unneutrality unaccompanied by any threats or any discriminatory actions against the employees with respect to their positions or wages, could not constitute the element which deprived the Petitioner of its right to express its opinion as to the legal rights of its employees.

To put it otherwise, the Petitioner respectfully contends that even if it did show a preference for the Association (which it denies), and even if its notices did favor the Association (which it denies because they specifically state that the employees do not have to join any labor organization at all), nevertheless it had the right to express those opinions as long as it did not accompany them with threats or other intimidating influences. If, as the Circuit Court states, the notices constituted a campaign appeal directed

toward defeating the efforts of the Union, the Petitioner, while it does not admit that it engaged in any such campaign, feels that it had the right to do so as long as it was a campaign of advice only and not one linked with threats or intimidation. The Petitioner also justifies the notices by the fact that the notice dictated by the Board which the petitioner had to post and did post (R. 98) was so phrased as obviously to constitute a stimulus upon the employees not only to join a Union but to join a particular named Union.

Various Circuit Courts in other Circuits have held that employers have the right to make such statements and post such notices.

In the Sixth Circuit, the case of *National Labor Relations Board v. Ford Motor Co.*, CCA (6), 114 F. (2d) 905, Cert. den. 312 U. S. 689, 61 S. C. 621, 85 L. Ed. 1126.

In the Second Circuit, the case of *National Labor Relations Board v. American Tube Bending Co.*, CCA (2), 134 F. (2d) 993, Cert. den. 320 U. S. 768, 88 L. Ed. 41, 64 S. C. 84.

In the Fifth Circuit, the case of *National Labor Relations Board v. Brown Paper Mill Co.*, CCA (5), 108 F. (2d) 867, Cert. den. 310 U. S. 651, 84 L. Ed. 1416, 50 S. C. 1104.

In the Ninth Circuit, the case of *National Labor Relations Board v. Union Pacific Stages*, CCA (9), 99 F. (2d) 153.

In the Seventh Circuit, the case of *National Labor Relations Board v. Gutmann & Co.*, CCA (7), 121 F. (2d) 756.

VI. The Circuit Court, on the Question of Free Speech, Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be Settled.

Free speech under the Constitution is one of the fundamental rights. As such it should not be permitted directly or indirectly to be limited or whittled away. The subject itself readily indicates the weight of its national significance. Similar cases in labor matters under the Act are constantly arising. The matter is in a state of doubt and a precious right is at stake.

VII. The Circuit Court, on the Question of Free Speech, Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court.

It was felt that this Honorable Court in *Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, had clearly settled the question by upholding the employer's right of free speech as long as the words together with other acts or influences were not part of a general scheme to threaten and intimidate employees in their rights of collective bargaining. Although the learned Court below states that it is following the case of *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 62 S. C. 344, 86 L. Ed. 348, it frankly admits, in its opinion, *that its interpretation thereof differs from that of the Circuit Court of the Second Circuit.* It erred in its construction of the *Virginia Electric & Power Co.* case, in that the Petitioner's notices were not accompanied by any intimidation and were not part of any implied threat. The learned Court below and the Board were both of the opinion that since they found the alleged unneutrality of the Employer between the Association and the Union showed a preference for the Association, the notices must be assumed to have been intended to further demonstrate that preference. What they overlooked was that the Petitioner under the *Virginia Electric & Power Co.* case had the right to indicate a preference as part of his right of free speech to express an opinion. Accordingly, it is respectfully submitted that the Circuit Court has decided the question in conflict with that applicable decision.

VIII. On the Question of Disestablishing the Association, the Circuit Court Has Rendered a Decision in Conflict With the Decisions in Other Circuits.

The conclusions of the Board do not show that the Petitioner controlled the Association. Its findings (R. 111) are that the Petitioner interfered with the formation and administration of the Association and contributed support to

it. These findings are based upon the notices and the disparate treatment alleged to have been accorded to the two organizations and the fact that, in the formation of the Association, some employees who had some minor supervisory status were participants. Whatever effect those factors may have upon the right of the Association to represent the employees, the fact is, that the Petitioner does not control the Association. It has been ordered not to recognize it. That is within its control. But it has also been ordered by the Decree of the Circuit Court and by the Board (R. 121) to completely disestablish the Association. A very pertinent fact is that the Petitioner never recognized the Association and has never had any dealings with it. It is impossible to understand, in view of that and in view of the Petitioner not being in control of the Association, how it can disestablish it or do any more than is already included in the negative order not to recognize it. The Ninth Circuit Court held, in the case of *National Labor Relations Board v. Germain Seed & Plant Co.*, CCA (9), 134 F. (2d) 94, that it was improper for an employer to be ordered to disestablish an Association where he had never recognized it.

IX. Importance of the Questions Involved.

These issues are of great public importance not only because they involve the grave question of interference with free speech but also because that question and the question as to what an employer can be ordered to do with reference to unaffiliated associations, are constantly arising under the Act and will continue to do so. They are active troublesome issues in the domain of the Federal law which is prolific in its doubts and the amount of litigation arising and which will continue to arise thereunder.

X. Record Transmitted Herewith.

Your Petitioner presents to this Court herewith a duly certified transcript of the entire record in the case known as *National Labor Relations Board, Petitioner v. M. E.*

Blatt Company, Respondent, and numbered in the docket of the Circuit Court of Appeals for the Third Circuit 8493 and 8494, having been considered together in the Court below, which entered one decree. The matter originally arose before the National Labor Relations Board in two separate proceedings but the Circuit Court considered the two orders of the Board together, and entered one decree thereon.

Wherefore your Petitioner, on the averments herein contained and the references in the annexed brief in support of this Petition, respectfully prays that this Honorable Court issue, under the seal of this Court, a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Third Circuit, a certified full and complete transcript of the record of the proceedings in this cause being submitted herewith, to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law; that the decree of the Circuit Court of Appeals may be reversed; and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated at Atlantic City, New Jersey, October 4, 1944, and filed on that date.

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